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518-071 O—73——1

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

ELLIOT L. RICHARDSON, ATTORNEY GENERAL, ET AL., PETITIONERS

v.

ROBERT BUSTOS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Elliot L. Richardson, Attorney General, *et al.*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit holding illegal the practice of admitting alien seasonal commuters as "returning resident aliens" within the meaning of 8 U.S.C. 1101(a)(27)(B).

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 15–30) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 31–32) was entered on April 16, 1973. A Petition

for Clarification and Rehearing was denied on May 22, 1973. By order dated July 9, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether aliens who, having entered the United States as immigrants and possessing permanent resident entry documents, desire to commute on a seasonal basis from their homes in Canada or Mexico to places of employment in the United States, may properly be treated as duly admitted immigrants returning from temporary visits abroad.

STATUTES INVOLVED

8 U.S.C. 1101(a)(27)(B) provides:

> § 1101. Definitions.
>
> (a) As used in this chapter—
>
> * * * * *
>
> (27) The term "special immigrant" means—
>
> * * * * *
>
> (B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

8 U.S.C. 1181(b) provides:

> § 1181. Admission of immigrants into the United States.
>
> * * * * *
>
> (b) Readmission without required documents; Attorney General's discretion.

Notwithstanding the provisions of section 1182(a)(20) of this title in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation.

8 U.S.C. 1182(a)(14) provides:

§ 1182. Excludable aliens.

(a) General classes.

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immi-

grants defined in section 1101(a)(27)(A) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a)(3) and 1153(a)(6) of this title, and to non-preference immigrant aliens described in section 1153(a)(8) of this title.

STATEMENT

On December 1, 1969, respondents brought a class action in the United States District Court for the District of Columbia on behalf of all citizens and alien permanent residents of the United States engaged in farm labor in California.[1] The complaint sought "a declaratory judgment under 28 U.S.C. 1331, an injunction and relief in the nature of mandamus" against the continued admission into the United States by the Immigration and Naturalization Service of alien "commuters"—*i.e.*, aliens previously authorized for permanent residence in the United States who maintain homes in Mexico or Canada from which they commute daily or seasonally into this country to work. The complaint alleged that the practice of admitting aliens who once had valid immigrant visas but who now enter the country by use of their Alien Registration Receipt Cards violates applicable provisions of

[1] According to the complaint, respondents Robert Bustos, an American citizen, and Lupe Murquia, a Mexican alien permanently residing in the United States, are farm laborers in California. The United Farm Workers Organizing Committee, also a respondent herein, is a labor union representing farm laborers in California.

the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.* On May 13, 1970, four Texas farm workers, each an American citizen or permanent alien resident of the United States, were permitted to intervene as plaintiffs on behalf of themselves and other farm workers in Texas.

On June 8, 1970, the parties agreed to a stipulation of pertinent facts (App. D, *infra*, pp. 34–37), after which cross-motions for summary judgment were filed. On December 21, 1971, the district court granted the government's motion for summary judgment (App. C, *infra* p. 33). The motions of plaintiffs and plaintiff-intervenors were denied, and the complaint was dismissed.

On appeal, respondents contended that alien commuters must have immigrant visas and a labor certification from the Secretary of Labor in order to enter the United States, that most commuters are properly non-immigrants who may not be admitted unless the Secretary of Labor determines that there is a labor shortage, and that commuters may not enter the country to take employment where a labor dispute exists, even if they have been previously employed there during a prior agricultural season.

On April 16, 1973, the court of appeals upheld the validity of the daily commuter procedure but ruled that the practice of admitting seasonal commuters as returning resident aliens was unlawful. The labor dispute claim was not reached. The case was remanded to the district court for proceedings consistent with the court of appeals' opinion (App. A, *infra*). On April 30,

1973, respondents filed a "Petition for Clarification and Rehearing" asking the court of appeals to designate as "seasonal commuters" those daily border crossers who are engaged in agricultural work and to rule favorably on the original third cause of action concerning commuters employed at the site of a labor dispute. The petition for clarification and rehearing was denied on May 22, 1973.

1. Most of the pertinent facts are not in dispute. The alien commuter procedure is not expressly authorized by statute. It was devised by immigration authorities in April 1927 in order to adapt a portion of the then long-standing border crossing system to the classification and documentary requirements of the Act of May 26, 1924, 43 Stat. 153. The rule established in 1927 was that an alien residing in Canada or Mexico and crossing the border to the United States for employment was classifiable as an immigrant and would have to have an initial admission for permanent residence with an immigration visa. That accomplished, he would thereafter be readmitted as a resident alien returning from a temporary visit abroad, notwithstanding that his actual place of residence continued to be in the contiguous country. He was called an "alien commuter." The basic rule was that a commuter could maintain that status by having stable and permanent employment in the United States but would lose it if he did not regularly work in the United States for six consecutive months.

Based upon their continuing eligibility for permanent residence, the Immigration and Naturalization

Service has considered such alien commuters as resident immigrants within the class defined in 8 U.S.C. 1101(a)(27)(B): "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad." This classification allows the Attorney General to admit the commuters, when they come here to work, pursuant to the informal documentation provisions of 8 U.S.C. 1181(b), and it exempts them on reentry from the labor certification provisions of 8 U.S.C. 1182(a)(14). Thus, the Attorney General has issued each commuter an alien registration receipt card (like that given resident aliens), upon presentation of which, and without more, commuters are allowed reentry into the United States. This practice, although not expressly sanctioned by statutory language, has been continuously followed since the first restrictive legislation in this area, the Immigration Act of 1924.

Respondents argued in the courts below that commuters are not within Section 1101(a)(27)(B) and thus are not eligible for the informal documentation privileges of Section 1181(b). In support of their argument, respondents cited a 1965 amendment to Section 1181(b). Prior to the amendment, the benefits of that section were available to "otherwise admissible aliens lawfully admitted for permanent residence *who depart from the United States temporarily*" (emphasis supplied). The amended version refers instead to "returning residence immigrants, defined in Section 1101(a)(27)(B) of this title, who are otherwise admissible" incorporating the Section 1101(a)(27)(B) defi-

nition of a returning resident immigrant as one who is "lawfully admitted for permanent residence [and] who is *returning from a temporary visit abroad*" (emphasis supplied). According to respondents, the clear meaning of the new language was to exclude the nonresident commuter from the informal documentation privileges of Section 1181(b) and the exemption from the labor certification requirements of Section 1182 (a)(14).

The government responded by detailing the long-standing and uninterrupted administrative practice under which commuters were and are considered resident immigrants within Section 1101(a)(27)(B) and have been accorded the benefits that follow from that classification. In the government's view, Congress—well aware of this classification—has not modified or disapproved it despite numerous reconsiderations of the general statutory pattern. Thus, the government argued below that the 1965 amendment did not affect commuters adversely, since they remain within the "resident" category of the statute as amended.

The facts relating to one area of dispute were not covered by the stipulation or developed in the district court. As part of their argument that commuters are required to have immigrant visas, respondents asserted (and petitioners herein denied) that the commuter practice is not supported by long, clear and consistent administrative practice. In particular, they asserted that the "seasonal commuter" procedure did not begin until 1965, following the termination of the "bracero" program (a contract labor arrangement

between the Governments of the United States and Mexico, pursuant to Public Law 78 of 1951, 65 Stat. 119). The government, conceding that there had not been an earlier separate formal concept of a seasonal commuter, maintained that this was only because theretofore this type of commuter had been merged in the general class, being not statistically conspicuous. The government denied that the practice was a post-1964 innovation.

2. In its decision, the court of appeals accepted the distinction between daily and seasonal commuters proffered by respondents. It acknowledged that the daily commuter procedure dates back more than 45 years, but spoke of the seasonal commuter system as a post-1964 creation of the Immigration and Naturalization Service. In the court's view, the daily commuter procedure had been sanctioned by administrative practice and remains valid, because Congress, knowing of the system, has left it unchanged through various enactments of immigration statutes. According to the court of appeals, the daily commuter procedure is a practice "vital to the lives of thousands of daily commuters on both sides of our land borders." Reversal of this practice "would cause severe dislocation and hardship" to persons who had "entered this country in reliance upon the immigration law as interpreted by the Service * * * despite the fact that they may have worked in this country for many years" (App. A, *infra*, pp. 28–29). The court took note of an affidavit submitted to the district court by the Secretary of State, William P. Rogers, on Octo-

ber 13, 1970 (*id.* at p. 29, n. 26). The affidavit outlined the role of the commuter procedure in the development of strong and mutually beneficial economic relations with Canada and Mexico and expressed concern at the possibility of a sudden judicial termination of the procedure. Secretary Rogers stated (App. E, *infra*, p. 38) that such a change would have "a serious deleterious effect upon our relations with both Mexico and Canada." The court of appeals construed this affidavit to apply only to daily commuters (App. A, *infra*, p. 29, n. 9).

The court of appeals did not regard the seasonal commuter procedure as having been sanctioned either by administrative practice or tacit congressional approval. According to the court, the seasonal procedure was "so patently a jerry-built patchwork, a synthetic construct hastily assembled after the termination of the bracero program in obvious contradiction to the legislative intent [of the 1965 amendments, which strengthened the labor certification provisions of the Immigration Act], that it cannot be given serious consideration as a meaningful guideline for the interpretation of the statute" (*id.* at p. 30). The court held that, unlike the daily commuter, the seasonal commuter cannot be said to be "lawfully admitted for permanent residence" and is properly classified as a non-immigrant—"an alien having a residence in a foreign country which he has no intention of abandoning * * * who is coming temporarily to the United States to perform temporary services or labor * * *" (8 U.S.C. 1101(a)(15)(H)).

REASONS FOR GRANTING THE WRIT

1. There is a conflict between the courts of appeals for the District of Columbia and the Ninth Circuits on the question whether seasonal commuters are validy classified as "returning resident aliens" within the meaning of 8 U.S.C. 1101(a)(27)(B). In 1970, in *Gooch* v. *Clark,* 433 F. 2d 74, certiorari denied, 402 U.S. 995, the Ninth Circuit upheld both the daily commuter procedure and the seasonal commuter procedure in the face of an attack by agricultural workers in California. The plaintiffs in *Gooch* presented the same issues and made the same arguments respondents did below. A divided panel held, in a thorough opinion by Judge Hufstedler, that both the daily and the seasonal commuter procedures (which the court did not legally differentiate) were not unlawful. In particular, it held that under the Immigration and Nationality Act the commuters were immigrants rather than nonimmigrants, that they have been lawfully admitted for permanent residence, and that on reentry they are returning from a temporary visit abroad. It also concluded that the 1965 amendments relied on by the District of Columbia Circuit in the present case cannot be read to bar the admission of either class of commuters.

This conflict between the decision of the District of Columbia Circuit and the decision of the Ninth Circuit in *Gooch* leaves the Service in a state of uncertainty as to how it should proceed. If the seasonal commuter system is illegal, the Service must move to pick up all alien registration receipt cards of aliens ad-

versely affected by the decision and to deny them reentry for the purpose of seeking or returning to employment. The necessity for an authoritative decision by this Court is therefore compelling.

2. Whether seasonal commuters may properly be admitted to the United States as "returning resident aliens," entitled to enter without regard to the normal documentation required for admission of an immigrant (8 U.S.C. 1181(b)) and without regard to whether the Secretary of Labor has certified that there are not sufficient workers in this country available to do the work for which the alien is entering (8 U.S.C. 1182 (a)(14)), is an important question which will affect the foreign relations of the United States and the lives of thousands of aliens who are dependent upon seasonal employment in the United States for their livelihood.

Prior to the restrictive immigration legislation of 1924, persons from Canada and Mexico could freely cross to their jobs in the United States; no formal entry procedures were required. The commuter practice arose in response to the recognized need to continue free access to this country by such persons and was "predicated upon good international relations maintained and cherished between friendly neighbors." *Matter of M-D-S & L-G & W-D-C,* 8 I. & N. Dec. 209, 213. The decision below directly conflicts with this long tradition. The sudden termination of so long-standing an administrative practice would result in severe economic dislocation among the 8,500 seasonal commuters along both the Mexican and Cana-

dian borders. These persons have patterned their lives to conform to United States immigration law in this regard, and the decision below would strip them of a substantial source of their livelihood.

Moreover, we are advised by the Department of State that the concern expressed by the Secretary of State in his affidavit filed with district court (App. E, *infra*, pp. 38–40) that the termination of the commuter procedure would have "a serious deleterious effect upon our relations with both Mexico and Canada" applies to the seasonal commuter procedure as well as to daily commuters. The court of appeals below recognized that a termination of the daily commuter procedure might lead to an adverse and perhaps retaliatory response by Canada and Mexico (App. A, *infra*, p. 29, n. 26). The same kind of response could result from termination of the seasonal commuter procedure.

3. The district court did not hold an evidentiary hearing on the question when the practice of admitting seasonal commuters began. No findings of fact were made regarding this history, and it was thus improper for the court of appeals to conclude that the practice was a "synthetic construct hastily assembled" by the Immigration Service after termination of the bracero program.[2] The government believes

[2] Unlike the Mexicans who were admitted under the bracero program, all of the persons admitted under the daily and seasonal commuter procedures have met all of the requirements necessary to become immigrants. There is, therefore, no basis for suggesting that the seasonal commuter procedure is simply a direct substitute for the terminated bracero program.

that it should be permitted to show that the seasonal commuter procedure predated the termination of the bracero program and that the increased use of the procedure was a natural and not improper outgrowth of the revised structure of the immigration laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
ROBERT L. KEUCH,
JOHN T. SPOTILA,
Attorneys.

AUGUST 1973.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 72–1178

ROBERT BUSTOS, AND LUPE MURQUIA, APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72–1179

ROBERT BUSTOS, ET AL., UNITED FARM WORKERS ORGANIZING COMMITTEE, APPELLANT

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72–1200

ROBERT BUSTOS, ET AL., CRISTOBAL CARDONA, ET AL., APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

Appeals from the United States District Court for the District of Columbia

Decided April 16, 1973 [Judgment entered this date]

Bruce J. Terris, with whom *Joseph Onek* was on the brief for appellants. *John W. Karr* also entered an appearance for appellants.

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Ralph Farb, Attorney, Immigration and Naturalization Service, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of Court, with whom *Harold H. Titus, Jr.,* United States Attorney, *John A. Terry,* and *Gil Zimmerman,* Assistant United States Attorneys were on the brief for appellees.

Before GEORGE C. EDWARDS, JR.,* *Circuit Judge for the Sixth Court,* LEVENTHAL, *Circuit Judge,* and JOHN H. PRATT,** *United States District Judge for the United States District Court for the District of Columbia.*

Opinion for the Court filed by *District Judge* PRATT.

PRATT, *District Judge*: This case challenges the legality of the system whereby the Immigration and Naturalization Service [1] for many years has permitted and continues to permit Mexican aliens [2] to commute either daily or seasonally from their place of residence in Mexico to employment in the United States. Plaintiffs-appellants Robert Bustos, an American citizen, and Lupe Murquia, a Mexican national permanently residing in the United States, are farm workers in California. The United Farm Workers Organizing Committee is an organization of farm workers whose purpose is to secure higher wages and better working conditions for its members. The defendant-appellees are the Attorney General, the Commissioner of the Service, and the Regional Commissioner of the Service for the Southwest Region. The

*Sitting by designation pursuant to 28, U.S.C. § 291(a).

**Sitting by designation pursuant to 28, U.S.C. § 292(a).

[1] Hereinafter referred to as the "Service."

[2] Although the gravamen of the Complaint is directed solely toward the Mexican aspect of this problem, there is no gainsaying the fact that the same considerations are applicable to commuters from Canada.

defendants have the statutory responsibility of enforcing the immigration and naturalization laws of the United States.

Plaintiffs filed a class action in the United States District Court for the District of Columbia on behalf of all citizens and alien permanent residents of the United States engaged in farm labor in California. The complaint sought declaratory and injunctive relief against the practice of the Service in admitting daily and seasonal commuters into the United States to perform agricultural labor. Five farm workers in Texas were permitted to intervene as plaintiffs for themselves and on behalf of all farm workers in Texas. There is no dispute as to any material facts. Acting on cross-motions, the District Court, on December 21, 1971, granted the motion for summary judgment of the defendants, denied the motions of plaintiffs and intervenor-plaintiffs, and dismissed the action. This appeal followed.

The issues raised by the parties on appeal are three. (1) Can aliens commuting daily or seasonally to work in the United States without maintaining residences in this country enter the United States without immigrant visas and without a certification by the Secretary of Labor that (a) there is a shortage of domestic labor of the kind the aliens are to perform, and (b) their employment will not affect wages and working conditions of American workers? (2) Are most commuters properly classifiable as non-immigrants who therefore may not be admitted into the United States unless the Secretary of Labor determines that no domestic labor is available? (3) Does 8 C.F.R. § 211.1 (b)(1) (1972) permit commuters to enter the country to take employment where a labor dispute exists even if they previously have been employed there? Plaintiffs content that the plain language of the statute and

the lack of a consistent administrative practice regarding commuters dictate a decision in their favor. The defendants join the issues by contending that the alien commuter system is the product of a long-standing consistent administrative application of the immigration laws and that Congress has repeatedly ratified the existence of this practice.

The Court is convinced that the parties have drawn the issues too broadly and consequently have not focused upon a vital distinction in the history of daily and seasonal commuters.[3] The distinction between these two types of commuters coupled with their relevant histories dictate the differing treatment we have given each of these classes of commuters.

I

The administrative treatment by the Service of the seasonal commuter aspect of this overall problem makes appropriate a brief reference to the origin and history of the bracero program. Due to the unusual farm labor shortage in the United States during World War II, the United States and Mexico in 1943 initiated the bracero program to provide for the seasonal importation of Mexican agricultural workers,[4] In 1951, when Congress renewed the bracero program in Public Law 78, it strengthened provisions in the

[3] Daily commuters are persons, whose actual dwelling place in fact, without regard to intent, is in a foreign contiguous country, and who commute daily to work in the United States. Seasonal commuters are persons, whose actual dwelling place in fact, without regard to intent, is in a foreign contiguous country, and who come to the United States for extended periods to perform seasonal work. *See generally* 8 U.S.C. § 1101(a)(33) (1970).

[4] Agreement between the United States of America and Mexico respecting the temporary migration of Mexican agricultural workers, effected August 4, 1942, 56 Stat. 1759.

agreement in order to protect domestic labor.[5] Growers were required to make reasonable efforts to attract domestic workers prior to certification by the Department of Labor of the need for foreign labor. During the 1950's and early 1960's, the importation of Mexican agricultural workers under the bracero program increased markedly. Despite the added safeguards to protect American labor, there arose a growing concern in the country over the program's adverse impact on domestic labor, Congress in 1964 therefore decided to allow the program to lapse.

Soon after Congress ended the bracero program, it amended in 1965 the Immigration and Nationality Act of 1952, the basic statute, to provide "safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market."[6] The most important change was to strengthen the labor certification process. Section 212 (a)(14) of the Immigration Act of 1952 had proved ineffective because an alien only could be excluded if the Secretary of Labor previously had certified that admittance of the alien would have an adverse effect on American labor. The Secretary had no way of knowing those who had applied to immigrate to the United States or their prospective occupations, residences, or employers. The 1965 amendments radically changed the certification procedure by reversing the burden of initiating the certification process. Under the new provision, an alien laborer cannot enter the United States unless the Secretary of Labor has certified that there is not enough domestic manpower available to perform such tasks and that his employ-

[5] Act of July 12, 1951, 65 Stat. 119.

[6] H. Rep. No. 745, 89th Cong. 1st Sess. 18 (1965); S. Rep. No. 733, 89th Cong., 1st Sess. 10 (1965).

ment would not adversely affect the wages of American workers similarly employed. 8 U.S.C. § 1182(a) (14) (1970).

Despite this background, the Service after the termination of the bracero program in 1964 created a new class of commuter—a "new immigrant," the seasonal worker.[7] The Service has admitted that the "seasonal worker is a person who came into being largely after the repeal of the bracero law," and that "many of them are former braceros who have been admitted to the United States temporarily for employment under" the Act.[8] Thus, while the daily commuter can work only within a relatively short automobile drive of the border, the seasonal commuter works in areas far inland in competition with a depressed and economically deprived work force of this country.

The metamorphosis of the bracero to seasonal commuter is directly inconsistent with Congress's purpose in ending the bracero program in order to eliminate its adverse impact on American workers. While the bracero program had many protections designed to protect domestic labor, the ex-bracero as a seasonal commuter enters and leaves the United States freely, subject to none of the many safeguards for domestic labor which characterized the bracero program prior to its termination in 1964. The fact that Congress has

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[7] The Government at oral argument admitted that at least until the 1952 Act, the number of commuters who arguably could be called seasonal was "inconspicuous."

[8] Statement by James S. Hennessy, Executive Assistant to the Commissioner of the Service, at the *Hearings on H.R. 12667, Employment of "Green Card" Aliens During Labor Disputes Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. 73 (1969).

approved the continued existence of the daily commuter program is no indication that it has approved a program which circumvents explicit expressions of Congressional concern for American labor, is a short-lived invention of the Service and which flies in the face of traditional Congressional concern for the American working man.[9]

More specifically, the Service, in order to reach this result, has interpreted seasonal commuters as "returning resident aliens," a class of immigrant not required upon re-entry to obtain immigrant visas. 8 U.S.C. § 1181(b) (1970). A returning resident alien is defined in the same Act as an "immigrant lawfully admitted for permanent residence who is returning from a temporary residence abroad." 8 U.S.C. § 1101 (a)(27)(B) (1970). The regulations amplify this definition by describing returning resident aliens as persons "returning to an unrelinquished lawful permanent residence in the United States after a temporary visit abroad." 8 C.F.R. 211.1(b)(1) (1972). As Judge Wright so persuasively pointed out in his dissenting opinion in the *Gooch* case,[10] the construction of "lawfully admitted for permanent residence" as including commuters "makes nonsense of the Congressional policy embodied in no fewer than five sections of the Act entirely apart from § 1101(a)(27)(B) and is contrary to the plain meaning of two others." In short, seasonal commuters are improperly classified as "returning resident aliens" and are not entitled to the benefits of such classification. The Service's practice is in violation of the clear and plain language of the statute.

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[9] The Court does not read the Secretary of State's affidavit as directed to the seasonal commuter system. See *infra* footnote 26.

[10] *Gooch* v. *Clark*, 433 F. 2d 74, 83 (9 Cir. 1970).

Aside from Congressional purpose and intent, we also find that seasonal commuters are properly to be classified as non-immigrants under the Act. Section 101(a)(15) of the Immigration and Nationality Act defines an immigrant as an alien not coming within ten categories of non-immigrants. 8 U.S.C. § 1101 (a)(15) (1970). A non-immigrant is there defined as—

> "[A]n alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming *temporarily* to the United States to perform *temporary* services or labor. * * *" [Emphasis added.] 8 U.S.C. § 1101 (a)(15)(H) (1970).

This provision reflects the intention of Congress in the Act of 1952 to differentiate carefully between immigrants coming to the United States for permanent recidence and non-immigrants coming temporarily.[11] Congress, therefore, in Section 101(a)(15)(H) created a new class of non-immigrants coming temporarily to perform services or labor. The purpose of the provision was to allow the admission of certain workers to alleviate "labor shortages as they exist or may develop in certain areas or certain branches of American productive enterprises, particularly in periods of intensified production."[12]

Subsection (H) explicitly covers a person coming to this country to perform services or labor if both the visit and the service are temporary. Seasonal commuters reside in a foreign country which they have no intention of abandoning, and they come only temporarily to the United States. All commuters who work as agricultural laborers only during the agricultural season provide only temporary services or

[11] *See* H. Rep. No. 1365, 82d Cong., 2d Sess., 36–37 (1952).
[12] *Id.* at 45.

labor. Seasonal commuters involved in this case come clearly within that section.[13] The Service's practice of classifying seasonal commuters as "returning resident aliens" thus has no statutory warrant, is contrary to the intent of Congress, and is illegal.[14]

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[13] Subsection (H) does not apply to daily commuters who come to the United States to a steady job throughout the year. While such a commuter comes temporarily to the United States each day, the services he provides are not temporary.

[14] In view of our holding that seasonal commuters coming to the United States for the first time today must be considered as non-immigrants under Section 101(a)(15)(H), it is also plain that seasonal commuters who have previously come to the United States as immigrants admitted for permanent residence must now be considered as non-immigrants. The Service's error in considering them as immigrants cannot convert non-immigrant into immigrant status. The law is plain that each and every time an alien enters the United States, his entry must be legal as of that time. It is no longer sufficient that the alien legally entered the United States on prior occasions. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 213 (1953); *Bonetti* v. *Rogers*, 356 U.S. 691, 698 (1958). Consequently, when a seasonal commuter enters the United States today, the legality of his entry must be determined as of that time. Even if the seasonal commuter entered legally one or a score of times before as an immigrant, his entry must be re-evaluated. Since he is a non-immigrant, he must conform with the laws relating to non-immigrants.

For the purpose of identifying the class which will be affected by our ruling re seasonal commuters, the Court notes that the Service considers seasonal workers who are present in the United States for over six months each year to be permanent alien residents of the United States despite the fact that their actual dwelling place in fact may be in a foreign contiguous country. *Matter of Hoffman-Arrayo*, —— I. & N. —— No. 2095 (Sept. 7, 1971); I Gordon & Rosenfield, Immigration Law and Procedure, § 2.19 (1972 Supp.). The Government appears to have conceded that all commuters—with the exception of those commuters who live and work in the United States for more than six months each year—do not reside in the

II

On the other hand, the daily commuter system dates from 1927, more than 45 years ago. Its historical origin stems from a border crossing system of the nineteenth and early twentieth centuries as a result of which aliens living in Canada and Mexico, as well as United States citizens living in the United States, were able to travel freely into the adjoining country for pleasure, for business or for employment. This border crossing system in its legal aspect can best be described as an informal reciprocal arrangement between the Government of the United States and the Governments of Canada and Mexico. In 1917, pur-

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United States. This concession covers the large majority of seasonal commuters since most seasonal commuters stay in this country only for the harvest season, a period of four to six months depending on the crop. However, some commuters do stay over six months in the United States. It must be observed that these commuters also may be affected by the Court's ruling since the position of the Service in equating mere physical presence over the six months with residence in this country is without statutory or logical basis.

The definition of residence received its present form in the 1952 Act. 8 U.S.C. 1101(a)(33) (1970). Prior to the 1952 Act, the Nationality Act of 1940 provided that "the place of general abode shall be deemed the place of residence." § 104, 54 Stat. 1138. The 1952 Act tightened this definition by defining "the place of general abode" as a person's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33) (1970). Actual residence is not then synonymous with physical presence but is a question of fact to be determined in each case. *See In Re Olan*, 257 F.Supp. 884, 893 (S.D. Cal. 1966); *Petition for Naturalization of Castrinakis*, 179 F.Supp. 444, 446 (D. Md. 1959); *Toy Teung Kwong* v. *Acheson*, 97 F.Supp. 745 747 (N.D. Cal. 1951). If it is determined that workers coming seasonally to the United States for periods of over six months do in fact reside in a foreign contiguous country, they are seasonal commuters who fall within the framework of this decision.

suant to a directive in the Immigration Act of that year to expedite travel to the United States from Canada and Mexico, the Service prescribed an identification card for the use of those who resided on either side of the border and habitually crossed the boundary for legitimate purposes. Between 1917 and 1927, aliens to whom identification cards had been issued enjoyed border crossing privileges as long as they were not barred by any qualitative exclusion provision of the 1917 Act.[15] These rules for border crossers continued unchanged until April, 1927.

The 1924 Act did not repeal or modify the basic 1917 Act but was expressly declared to be an addition to and not a substitution for the 1917 law.[16] The 1924 Act classified all arriving aliens as either immigrants or non-immigrants. An immigrant was defined as any alien destined to the United States except one within any of the six enumerated non-immigrant classes.[17] As a result, by 1927 the Service in General Order No. 86, had decided that aliens residing in foreign contiguous countries and entering the United States to engage in employment would thereafter be considered "immigrants" who must first be admitted for permanent residence.[18] Those who achieved such admission within a grace period were permitted to enjoy the border crossing privilege. Paragraph Five of the General Order provided that "[a]liens who have complied with the requirements of this General Order governing permanent admission will be considered as having entered for permanent residence." Thus, the daily commuter was born.

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[15] *See* Act of February 5, 1917, §§ 3, 23; 39 Stat. 875, 892.

[16] Immigration Act of 1924, § 25; 43 Stat. 166.

[17] *Id.* § 3, 43 Stat. 154–55.

[18] General Order No. 86, Bureau of Immigration, April 1, 1927.

General Order No. 86 rested on the implied premise that the adaptation of the border crosser system to the Immigration Act of 1924 and its continued existence as the daily commuter system was in accord with the will of Congress. The 1924 Act had made no mention of border crossers as such. In the contemporaneous view of the administrative authorities it was plain, however, both from the statute itself and from its history, that Congress did not attempt to deal with the already long-standing border crossing system, and must not have intended to disturb it. In the 1924 Act, Congress was wholly preoccupied with restricting overseas immigration, particularly from certain countries in eastern and southern Europe. Meanwhile, the directive of the 1917 Act to facilitate border crossing remained on the statute books. Since then the Service has maintained control over the daily commuter system through administrative practice.

In 1952 the organic statute, the Immigration and Nationality Act, became law. This Act brought together the elements of both the 1917 and 1924 Acts and at the same time enacted certain new provisions. Daily commuters were not mentioned in the new law and its text and legislative history are silent on the subject. From this, the Service might well have concluded that it was the intent of Congress in the Act to permit alien commuters to continue to come to the United States in the same status they had enjoyed under the prior laws. Certainly, if Congress had intended with one stroke to outlaw the commuter system, thereby taking away the long-standing right of entry of aliens who had been admitted for permanent residence, there would have been some indication of such intent.[19]

[19] No mention of commuters is made in the 1965 amendments of the 1952 Act. Act of October 3, 1965, Pub. L. No. 89-236, 79 Stat. 911, *amending* 8 U.S.C. 1101 *et seq.* (1970).

In the light of the above history and administrative practice, it is fair to assume that the historic daily commuter practice known to Congress [20] was expected to continue unchanged in the 1952 law. Where an administrative practice has continued in existence for over 45 years and has consistently been extended in the light of various immigration Acts which have never expressed any mention or disavowal of the practice,[21] efforts to change or eliminate such a practice should be addressed to the Congress, not to the Courts.[22]

The Court is also mindful that the plaintiffs place reliance on the plain language of 8 U.S.C. §§ 1181(b),

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[20] *See* S. REP. No. 1515, 81st Cong., 2d Sess., 535–36, 616 (1950).

[21] *See Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States*, 377 U.S. 235 (1964). There concerning the reenactment rule, Mr. Justice Harlan, for a unanimous Court noted:

"Some weight is due to the consistent interpretation of the Maritime Commission, the agency entrusted with administration of the statute. . . . The successive extensions by Congress of the Commission's authority . . . are certainly not controlling, particularly since it does not appear that Congress ever advertently addressed itself to the claim of invaldity . . .: they do, however, strengthen to some extent the Commission's conclusions . . . . Needless to say, these 'interpretative aids,' neither singly nor in conjunction, could lead to an affirmance here if it were clear that the Commission's action contradicted the requirements of the . . . Act . . . However, they are consistent with, and lend support to, what we believe to be the most sensible view of the statutory framework."

Id. at 241–42. *See also* 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.07 (1958).

[22] Legislation was introduced into the 92nd Congress which would profoundly affect the commuter system. *See, e.g.*, S. 1373, 92d Cong., 1st Sess. (1971); S. 1488, 92d Cong., 1st Sess. (1971); H.R. 8746, 92d Cong., 1st Sess. (1971); H.R. 14831, 92d Cong., 2d Sess. (1972).

1101(a)(27)(B), and 1101(a)(20) (1970). The majority opinion in *Gooch* v. *Clark*, 433 F.2d 74, 78–81 (9 Cir. 1970), answers some of these contentions.[23] It should suffice to say that the statutory language is not as plain and unambiguous as plaintiffs contend.[24] Plaintiffs, for instance, make much of the contention that one living in a foreign contiguous country cannot be a "resident" of the United States. But the concept of permanent "residence" can be taken to include the place of work of a daily commuter crossing international boundaries, in the same sense that a person commuting daily to his business in New York City, where he has a permanent commitment and interest in the on-going vitality and soundness of the city, and where he may have, for example, fraternal and cultural associations, may well consider himself a New Yorker even though his home in the suburbs is located in New Jersey or Connecticut. Daily commuters are often fully integrated into the United States economy, including—particularly in the case of commuters from Canada—membership in United States unions, and supervisory positions in United States business enterprises. Thus, a daily commuter could be a resident of the United States within the plain language of the Act.

Finally, we are aware that the perpetuation of the daily commuter system is vital to the lives of thousands of daily commuters on both sides of our land borders. These individuals make important contributions to the economies of their respective cities, such as Windsor-Detroit, and reversal of the present practice would cause severe dislocation and hardship. In

[23] The Court in *Gooch* did not sharply distinguish daily from seasonal commuters.

[24] *E.g.*, 433 F.2d at 78–79.

seeking an answer to the economic competition of ex-braceros who operate under the seasonable commuter system, plaintiffs seek the wholesale expulsion or exclusion from the United States of daily commuters who entered this country in reliance upon the immigration law as interpreted by the Service,[25] and despite the fact that they may have worked in this country for many years.[26]

Plaintiffs' request for relief is broader than is necessary to meet the burden of their complaint; they have used a broadsword when a rapier would have been more appropriate. We are unwilling to disregard this long-standing administrative practice by ordering a change of such far-reaching consequences and affirm the action of the District Court as it relates to daily commuters.

Our disposition differs from that proposed in *Gooch* by either the majority or dissent. While we have rooted our disposition in the statute as it stands, we have been particularly mindful of the need for construction in the light of a genuinely long-standing

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[25] *See Texas State AFL–CIO* v. *Kennedy*, 330 F.2d 217, 219 (D.C. Cir.) *cert. den.* 379 U.S. 826 (1964).

[26] Also involved are the Governments of Canada and Mexico. The Secretary of State, in an affidavit before the Court, has voiced the concern of these two neighboring countries at the possibility of a sudden judicial termination of the commuter system. In his considered judgment, such a change of policy would have "a serious deleterious effect" and "adversely affect" our relations with our two neighbors. Appendix at 52–54, Affidavit of Honorable William P. Rogers, Secretary of State of the United States, filed October 13, 1970. Although the Secretary for obvious reasons made no mention of the likelihood of an adverse response by Canada and Mexico against American nationals commuting daily to work in those two countries, the strong possibility of retaliatory measures by these countries requires no elaboration by us.

administrative practice in regard to daily commuters, a practice that we are convinced Congress did not mean to scrap, so far as concrete results of admittance of daily commuters are concerned. As to the post-1964 practice of the Service in regard to seasonal commuters, it is not only recent in origin, but is so patently a jerry-built patchwork, a synthetic construct hastily assembled after the termination of the bracero program in obvious contradiction to the legislative intent, that it cannot be given serious consideration as a meaningful guideline for the interpretation of the statute.

Accordingly, this case is remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

APPENDIX B

[Filed April 16, 1973, Hugh E. Kline, clerk]

United States Court of Appeals for the District of Columbia Circuit

September Term, 1972

Civil Action 3386–69
No. 72–1178

ROBERT BUSTOS, AND LUPE MURQUIA, APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72–1179

ROBERT BUSTOS, ET AL., UNITED FARM WORKERS ORGANIZING COMMITTEE, APPELLANT

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72–1200

ROBERT BUSTOS, ET AL., CRISTOBAL CARDONA, ET AL., APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

Appeals from the United States District Court for the District of Columbia

Before GEORGE C. EDWARDS, JR.,* *Circuit Judge for the Sixth Circuit,* LEVENTHAL, *Circuit Judge,* and JOHN H. PRATT,** *United States District Judge for the U.S. District Court for the District of Columbia.*

Judgment

These cases came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel. Upon consideration thereof, it is

ORDERED AND ADJUDGED by this Court that these cases are hereby remanded to the District Court for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

Hugh E. Kline,
Clerk.

Dated: April 16, 1973

Opinion by District Judge Pratt.**

*Sitting by designation pursuant to 28 U.S.C. § 291(a).

**Sitting by designation pursuant to 28 U.S.C. § 292(a).

APPENDIX C

[Filed December 21, 1971, James F. Davey, Clerk]

United States District Court for the District of Columbia

Civil Action No. 3386–69

ROBERT BUSTOS, ET AL., PLAINTIFFS

v.

JOHN H. MITCHELL, ET AL., DEFENDANTS

Order

This cause having come before the Court on the parties' cross-motions for summary judgment and upon consideration of the record and memoranda of the parties; and the Court being fully informed in the premises; and it appears to the Court that there exists no genuine issues of material facts and defendants are entitled to judgment as a matter of law,

It is by the Court this 21st day of December, 1971

ORDERED AND ADJUDGED:

1. That defendants' motion for summary judgment be and it hereby is granted;

2. That the motions of the original plaintiffs and the intervenor-plaintiffs for summary judgment be, and they hereby are, denied; and

3. The action is hereby dismissed.

AUBREY E. ROBINSON, JR.,
United States District Judge.

APPENDIX D

Civil Action No. 3386–69

ROBERT BUSTOS AND LUPE MURQUIA, ON BEHALF OF THEMSELVES AND A CLASS OF PERSONS SIMILARLY SITUATED BUT TOO NUMEROUS TO MENTION; AND UNITED FARM WORKERS ORGANIZING COMMITTEE, AN UNINCORPORATED ASSOCIATION, PLAINTIFFS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES; RAYMOND FARRELL, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES; AND HARLAN B. CARTER, REGIONAL COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES, DEFENDANTS

Stipulation

Plaintiffs and defendants stipulate to the following facts, for the purpose of this case only:

1. Defendants are charged by law with the administration of the immigration laws of the United States.

2. The defendants and their predecessors have interpreted those laws as authorizing the admission of alien commuters. Such commuters are aliens who were originally admitted as permanent resident aliens with immigrant visas but who reside in adjacent countries and come to the United States daily or at other intervals for employment. Every alien admitted as an immigrant is issued an Alien Registration Receipt Card (Form I–151). The defendants recognize such a card as evidence of the holder's lawful admission

to the United States for permanent residence and his compliance with alien registration requirements, and also permit its use, under prescribed conditions, as a document entitling him to readmission to the United States as a returning resident immigrant, if he is otherwise admissible. Commuters are readmitted to resume or to seek work upon presentation of Form I–151 unless defendants find that they did not work at regular and stable employment in the United States within six months, in which event defendants consider the alien to have lost commuter status and to be not readmissible with Form I–151.

3. Since defendants regard alien commuters as aliens lawfully admitted for permanent residence who are returning to the United States after a temporary absence abroad, defendants have regarded such commuters as exempted by statute from the labor certification requirements prescribed by section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14), as originally enacted in 1952 and as amended in 1965.

4. Since the inception of the alien commuter program, defendants, and their predecessors, have authorized the reentry of daily commuters upon presentation of a prescribed document showing their status as aliens lawfully admitted to the United States for permanent residence. Originally the prescribed document was known as a resident alien's border crossing card. In recent years the acceptable document presented by commuters upon their reentry is the Alien Registration Receipt Card (Form I–151), which is popularly known as the green card. In 1967, 8 CFR 211.1(b)(1) was amended by defendants, and their predecessors to proscribe use of Form I–151 by commuters who seek to enter the United States "primarily" to accept employment at a plant where the Secre-

tary of Labor has certified the existence of a labor dispute involving a work stoppage or layoff of employees.

5. The defendants construe the last sentence of 8 CFR 211.1(b)(1) as inapplicable to, and it is not being enforced by defendants against, aliens who are lawful residents of the United States, returning from a temporary absence outside the United States.

6. The defendants construe the last sentence of 8 CFR 211.1(b)(1) as applicable against alien commuters who are not residents of the United States, and who enter the United States to seek employment, whether daily or seasonally, at any place where the Secretary of Labor has certified the existence of a labor dispute involving work stoppage or layoff of employees, or to continue such employment commenced after the Secretary of Labor's certification.

7. Defendants regard the last sentence of 8 CFR 211.1(b)(1) as inapplicable to alien commuters coming to the United States from Canada or Mexico in possession of a Form I–151, if such aliens have been previously admitted for permanent residence, have been employed and living in the United States each year for more than six months in connection with seasonal employment, and seek to enter the United States to resume such residence and employment. Defendants regard such persons to be residents of the United States within the criteria, to which defendants now adhere, expounded by *Cermeno-Cerna* v. *Farrell,* 291 F. Supp. 521 (C.D. Cal., 1968), pending on appeal to the United States Court of Appeals for the Ninth Circuit, the decision of the special inquiry officer of the Department of Justice in *Matter of Benavides-Hino-*

josa, decided September 11, 1968, and the affidavit by the General Counsel of the Immigration and Naturalization Service submitted to the Court in *Cermeno-Cerna* v. *Farrell, supra.* Copies of that affidavit and of the special inquiry officer's unreported decision in *Matter of Benavides-Hinojosa, supra,* are attached. Defendants regard the last sentence of 8 CFR 211.1 (b)(1) as applicable to daily commuters and to other alien commuters who have not been employed and living in the United States for more than six months each year.

8. Defendants also regard the regulation as inapplicable to residents of Canada or Mexico who are maintaining status as commuters and who are returning to the United States for the purpose of continuing employment at a place where the Secretary of Labor has determined that a labor dispute exists, when such employment commenced prior to the date of the Secretary of Labor's determination. Defendants regard such employment as continuous if the alien commuter is returning on each occasion to the same employer, even if he has been absent from the United States for several months each year.

BRUCE J. TERRIS,
Attorney for Plaintiffs.

GIL ZIMMERMAN,
Assistant United States Attorney,
Attorney for Defendants.

CHARLES GORDON,
General Counsel, Immigration and Naturalization Service, Attorney for Defendants.

JUNE 8, 1970.

APPENDIX E

United States District Court for the District of Columbia

ROBERT BUSTOS, ET AL., PLAINTIFFS

against

JOHN MITCHELL, ET AL., DEFENDANTS

Affidavit of Honorable William P. Rogers, Secretary of State of the United States

1. I am the Secretary of State of the United States. Subject to direction of the President, I am responsible for the conduct of the foreign relations of the United States. I make this affidavit because the questions raised in plaintiffs' complaint have important implications for the relations of the United States with Mexico and Canada.

2. In my judgment, the long-established practice with regard to commuters across the borders of the United States contributes to the friendly relations of the United States with Mexico and Canada. A sudden judicial termination of the commuter system, displacing the present immigrant commuters, would have a serious deleterious effect upon our relations with both Mexico and Canada.

3. The flow of persons and goods across the United States-Mexican border has helped the development of strong and mutually beneficial economic relations along the Mexican border. In a very real sense, the cities along the border—for example, El Paso and Juarez, Eagle Pass and Piedras Negras, Laredo and

Neuvo Laredo, Brownsville and Matamoros, and San Diego and Tijuana—have grown into single economic communities. A disruption in the life of these communities would do real harm to good neighbor relations in the area.

4. The purchases by Mexican nationals of American goods on the United States side of the border constitute a major portion of retail sales on the United States side of the border. If as a result of a substantial reduction in the commuter traffic across the border between Mexico and the United States, a significant number of Mexican nationals would be deprived of their earning power, the trade between the two countries along the border would be substantially reduced. We could expect that this would have an immediate depressing effect on the economy of the region on both sides of the border.

5. In the last few years, the United States Government has taken steps to terminate the program of contract labor, which provided employment for many thousands of Mexican nationals in the United States. This action has had severe impact on the Mexican economy. The Congress has also acted in this area by extending the labor certification requirements of Section 212(a)(14) of the Immigration and Nationality Act to Western Hemisphere immigrants and by imposing an annual ceiling on Western Hemisphere immigration, effective July 1, 1968.

In contrast, Congress has not acted to restrict the commuter program although this long-standing administrative practice has been studied several times. The immigrant commuter has patterned his life to the form of United States law and practice, and a judicial termination of that practice would harm thousands of families and impact heavily on the Mexican economy.

6. The present practice with regard to commuters is

in effect not only at the border between the United States and Mexico, but also at the border between the United States and Canada. Canadian commuters, many of whom are union members, are a significant element in the economies of the United States and Canada, particularly in the Windsor-Detroit area. The sudden disruption of this traditional practice would be inconsistent with the trend toward closer economic cooperation with Canada exemplified by the 1965 Auto Agreement leading to a unified market in automotive products. The Government of Canada, like the Government of Mexico, has expressed its concern over litigation attacking the status of immigrant alien commuters. A judicial decision affecting the status of the Canadian commuters could also adversely affect our relations with Canada and the status of United States nationals and investment in Canada.

7. For the above reasons it is my opinion that judicial termination of the commuter system would be damaging to the foreign relations of the United States. Any adjustment that may be desirable should be fashioned by administrative or legislative processes which are better suited to distinguish situations and to accommodate conflicting interests.

WILLIAM P. ROGERS.

Subscribed and sworn to before me on the 21st day of April, 1970.

ERMINIA R. SCIARRINO,
Notary Public.

U.S. GOVERNMENT PRINTING OFFICE: 1973